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I. Introduction

The Takings Clause of the Fifth Amendment includes the often ignored Public Use Provision. This paper looks at the Court's broad interpretation of this provision and its deference to redevelopment agencies. Currently, the Court uses two tests - "purely private" and blight removal - to determine if the government action has violated the public use provision. In a recent California case, 99 *Cents Only Store v. Lancaster Redevelopment Agency*[1], the district judge applied both of these tests and determined that the Redevelopment Agency had overstepped its authority. This paper discusses the role the courts should play in redevelopment in light of the framers' intent and precedent in the area of substantive economic due process. This paper also addresses the impact of 99 *Cents* on takings law and the need for a clear test to determine what is a legitimate taking for public use.

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1. 237 F. Supp.2d 1123 (C.D. Cal. 2001); dismissed and remanded 60 Fed.Appx. 123, 2003 WL 932421 (9th Cir. 2003)(not selected for publication). The appellate court affirmed the district court's conclusion that the controversy was not moot at the time the district court granted the injunction. This procedural setting does not affect the substantive law discussed herein.

II. History of the Takings Clause: How Far is Too Far?

Eminent domain is the power of the sovereign to acquire private property for public use.[2] The sovereign's power of eminent domain existed at common law.[3] This sovereign power to take property was limited[4] by the Fifth Amendment to the United States Constitution: "nor shall private property be taken for pubic use, without just compensation."[5] The Fifth Amendment places two conditions on the government's power to take property: the taking must be for a public use and the landowner must receive just compensation. The United States Supreme Court began to interpret these limitations nearly a century after the drafting of the Fifth Amendment.[6] The first view of eminent domain was rather narrow: "a right belonging to a sovereignty to take private property for its own uses, and not for those of another."[7]

A broader view is that "public use" provides the public with some benefit.[8] As the American economy developed in the twentieth century, the Supreme Court moved toward this more broad view of the Public Use provision.[9] The Court began to reason that the Public Use provision was satisfied as long as the taking contributed to the economic growth of the community. In a landmark redevelopment case of 1954, the Court acknowledged the police power of redevelopment agencies to take private property.[10] Thus, the police power components of "public safety, health, and morality," fulfilled the requirements of the Public Use provision.[11] In this case, the Court determined the taking of land for a private developer contributed to economic growth, enhanced public health, safety, morals and welfare, and was thus determined to be a legitimate taking under the Fifth Amendment[12] because an area was determined to be "blight."[13]

2. BLACK'S LAW DICTIONARY (7th ed. 1999).

3. The inherent power of the sovereign to exercise eminent domain was "well known when the Constitution was adopted." Kohl v. U.S., 91 U.S. 367, 372 (1876). Term "eminent domain" is traced back to legal writings of Grotius in 1685. See Jack J. Kitchin, *What Use Is a Public Use in Eminent Domain*?, 4 ST. LOUIS U. L.J. 316 n. 1 (1957) (citing Groff v. Bird-in-Hand Turnpike Co., 18 A. 431 (Pa. 1889).

4. At common law, the power of eminent domain could take any form that the government desired. Thus, the broad scope of common law eminent domain authority was limited. 1 JOHN J. DELANEY ET AL., LAND USE PRACTICE AND FORMS: HANDLING THE LAND USE CASE 21-2 (2d ed. 1999).

5. U.S. CONST. AMEND V.

6. Kohl, 91 U.S. at 371 (also extending the limitations of the takings clause to the states through the Fourteenth Amendment). In *Chicago, Burlington & Quincy Railroad v. City of Chicago*, the Court specifically held that the Fourteenth Amendment prevented the states from taking property without just compensation. 166 U.S. 226 (1897).

7. *Id.* at 373-74.

8. Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 292 (2000)

9. See e.g., Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); *see also* Berman v. Parker, 348 U.S. 26 (1954); *see also* Old Dominion Land Co. v. U.S., 269 U.S. 55 (1925).

10. Berman, 348 U.S. at 28.

11. *Id.*

12. *Id.* at 29.

13. Physical and economic conditions that cause blight. Cal. Health & Safety Code § 33031 (West 2002). (Buildings in which it is unsafe or unhealthy for persons to live or work. Factors that prevent or substantially hinder the economically viable use or capacity of buildings or lots. Depreciated or stagnant property values or impaired investments, including those properties containing hazardous wastes. Abnormally high business vacancies, abnormally low lease rates, high turnover rates, abandoned buildings, or excessive vacant lots within an area developed for urban use and served by utilities.)

Thirty years later, the Supreme Court reaffirmed the import of the Public Use provision and stated "purely private takings will not withstand the scrutiny of the public use requirement."[14] However, in the same case, the Court also stated that if the purpose of the taking was rationally related to a conceivable public use, it would not violate the Takings Clause.[15] In fact, a private taking may rise to the level of a public affair given its class or character.[16] This shift to a broader construction of the Public Use provision maintained the Supreme Court's deferential treatment of public use determinations by the legislature.

The Supreme Court had extended great deference to the legislative determination of public use as early as 1896.[17] At that time the Court held that "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation."[18] If a public use proposed by the legislature is legitimate and lies within an explicit constitutional power of Congress, the use satisfies the Public Use provision.[19] Therefore, an implied power to condemn exists in situations where the power of eminent domain is necessary or appropriate to carry out other powers. This deferential standard extends from the Court's belief that the legislature would not abuse its power because the just compensation requirement, which entails full value of the property to be paid, restricts any condemnation for public use.[20] However, the Court clearly specified that if the legislature delegates the power of eminent domain to a private entity, the deference would not be as strong.[21]

In practice, however, judicial review has been so deferential that a finding of pubic use seems inevitable.[22] The Supreme Court has held that public use is coterminous with the scope of the sovereign's police power and, therefore the Court defers to a legislative determination that is rationally related to a *conceived* public purpose.[23] The limit of the Court's deference is that if a showing of a public use is demonstrably pretextual, no judicial deference is required.[24]

The role of the courts in the area of eminent domain cases is self-defined as an "extremely narrow one."[25] Having the courts play such a limited role may be dangerous because it allows corporations to collude with the government and condemn private property for any public use that can be rationalized.[26] Most economic development plans fall within public use

14. Midkiff, 467 U.S. at 245.

15. *Id*. at 241.

16. *Id*. at 244 (citing Block v. Hirsh, 256 U.S. 135, 155 (1921)).

17. U.S. v. Gettysburg Electric Ry. Co., 160 U.S. 668 (1896).

18. *Id*. at 680.

19. *Id*. at 683.

20. *Id*. at 680.

21. *Id*.

22. Peter J. Kulick, Comment, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking"- A Proposal to Redefine "Public Use,"* 2000 L. REV. MICH. ST. U. DET. C.L. 639, 655 (Author writes how the broad definition of the public use requirement allows an expansive reach of public-private takings. *citing* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 634 (1981).

23. Midkiff, 467 U.S. at 241.

24. Armendariz v. Penman, 75 F.3d 1311, 1321 (1996).

25. Berman, 348 U.S. at 32.

26. Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. REV. 49, 51 (1999).

because there is a *possible* benefit to the public through general welfare and the legislature has the express power to provide for the general welfare.[27] However, simply concurring with the legislature's determination that the rationally conceived use, purpose or benefit is good for the public eliminates the judicial check on legislative decision making. An expansive definition of the Public Use provision and great judicial deference have opened the door for private transfers of condemned property and may have eliminated the Fifth Amendment as a viable safeguard of private property rights.[28]

A. The Supreme Court Acknowledged the Power of Redevelopment Agencies

Modern redevelopment law tests the extent of legislative power, the expansive definition of the Public Use provision, and the deferential role of the courts. In B*erman v.* P*arker*, the U.S. Supreme Court was faced with a congressional determination that with respect to Washington D.C.'s substandard housing and blighted areas, redevelopment could not be attained "by the ordinary operations of private enterprise alone without public participation."[29] In 1945, Congress enacted the District of Columbia Redevelopment Act to eliminate injurious conditions[30] through "all means necessary and appropriate for the purpose."[31] Congress created the D.C. Redevelopment Land Agency and granted it eminent domain powers to acquire private property in order to prevent, reduce, or eliminate blighting factors.[32]

The first redevelopment project attempted was a low-rent housing district. The Agency acquired and assembled real property and was authorized to either lease or sell some of the property[33] to a redevelopment company or individual who promised to carry out the redevelopment plan.[34] One landowner, who owned a department store in the districted area, objected to such appropriation because his property was not blighted slum housing. The land owner argued that "[t]o take a man's property for the purpose of ridding the area of slums is one thing; it is quite another . . . to take a man's property merely to develop a better balanced, more attractive community."[35] The Supreme Court disagreed. The Court believed that the standards stated in the Act were adequate not only for eliminating the slums,[36] but also the blight areas that tend to produce slums.[37]

The main guardian of the public welfare is the legislature.[38] This concept of

27. US CONST. art. I, § 8.

28. S*ee* J*ones*, *supra* note 7 at 287.

29. Berman, 348 U.S. at 29.

30. These conditions include substandard housing and blighted areas that are injurious to the public health, safety, morals, and welfare. I*d*. at 28.

31. I*d*.

32. I*d*. at 29.

33. The Agency was also authorized to transfer the land to public agencies for public purposes, including streets, utilities, recreational facilities and schools. I*d* at 30.

34. I*d*.

35. I*d*. at 31.

36. The district court limited the redevelopment plan to this narrow definition: only existing slums. The Supreme Court extended the interpretation of the standards to include future slum areas. I*d*. at 35.

37. I*d*.

38. S*ee* Hirsh, 256 U.S. at 155.

public welfare is broad and inclusive.[39] The legislature has the authority to determine the values and needs of community to support the public welfare.[40] Once the authority of Congress is defined to cover the public welfare, the right to exercise eminent domain as a means to the end is evident.[41] To achieve this end, the authorized agencies may use eminent domain to acquire property in all blighted parts of the community instead of on a limited "structure-by-structure basis."[42] The specific attack on the problem is left to the discretion of the legislative branch once the legislature determines the broad public purpose and the expanse of public welfare covered by the Agency.[43]

In B*erman*, the Supreme Court clearly defined the extent of this discretion by stating that its role in determining a public use was extremely narrow.[44] In fact, once Congress has determined the variables necessary to maintain the public welfare, the Court holds it is not in a position to "reappraise" these determinations.[45] When a public purpose has been identified, the means by which the legislature carries out its plan - the amount and character of land to be taken - fall within the legislature's discretion.[46]

The Court's broad interpretation of the police power of the redevelopment agency in B*erman* bestowed a certain amount of authority on redevelopment agencies and local governments across the country. After B*erman*, two broad rules existed: the Public Use provision could be fulfilled by economic revitalization and the courts would give great deference to the legislative determination of public use.[47] Since public welfare and removal of blight legitimately fulfilled the "Public Use" provision, redevelopment agencies had the authority to condemn property on little more than a study and findings of blight.

B. Taking the "Use" out of the "Public Use" Provision

Thirty years later, the Supreme Court reaffirmed a broad reading of the Public Use provision.[48] In M*idkiff*, the U.S. Supreme Court relied on B*erman* to reverse a Ninth Circuit opinion that the Hawaii Land Reform Act of 1967[49] did not pass the "requisite judicial scrutiny of the Public Use Clause."[50] The Ninth Circuit narrowly interpreted B*erman* to hold that the government is required to "possess" and use the property during the taking.[51] However, such a literal reading of the takings clause was rejected by R*indge* Co. *v.* L*os* A*ngeles*.[52] Furthermore, the Ninth Circuit

39. S*ee* Day-Brite Lightning, Inc. v. Missouri, 342 U.S. 421, 424 (1952).

40. The Court held that "when the legislature has spoken the public interest has been declared in terms well-nigh conclusive." Berman, 348 U.S. at 32.

41. S*ee* Gettysburg Electric Ry. Co., 160 U.S. at 679; *see also* Luxton v. N. River Bridge Co., 153 U.S. 525, 529-30 (1894).

42. Berman, 348 U.S. at 34.

43. S*ee* Shoemaker v. U.S., 147 U.S. 282, 298 (1893).

44. Berman, 348 U.S. at 32.

45. I*d*. at 33.

46. I*d*. at 35-36 (citing Shoemaker, 147 U.S. at 298).

47. I*d*. at 32, 34.

48. Midkiff, 467 U.S. at 229.

49. Land Reform Act of 1967, Haw. Rev. Stat. §§ 516-1(2), (11), 516-22 (1977).

50. Midkiff, 467 U.S. at 235.

51. 702 F.2d 788 (9th Cir. 1983).

52. 262 U.S. 700, 707 (1923) ("[I]t is not essential that the entire community, nor even any considerable portion . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.").

held that a more rigorous judicial scrutiny of the state's legislative determinations was necessary.[53] The Supreme Court disagreed and stated that requiring this stricter standard would be ironic because the Public Use provision is incorporated through the Fourteenth Amendment, whereas the legislature is mandated by the Fifth Amendment.[54]

Instead, the Supreme Court read B*erman* to require both a legitimate legislative police power and judicial deference: "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[55] In M*idkiff*, the Hawaiian legislature claimed public welfare alone, with no finding of blight, as its authority to condemn the property specified in the Land Reform Act.[56] The Hawaiian legislature passed the Act to condemn privately owned residential tracts and then to transfer the condemned property to existing lessees to redress problems caused by concentrated land ownership.[57] The purpose was to redistribute the land to guard against inflating land prices and to protect public tranquility and welfare.[58]

To determine whether Hawaii condemned the property for a "public use" the Court examined the scope of the state's police power and concluded that the legislature is "the main guardian of the public needs."[59] The Court held that the Public Use requirement is "coterminous[60] with the scope of the sovereign's police power."[61] Then, the Court deferred to the legislature's police power. Such deference is required "until it is shown to involve an impossibility."[62] Once the legislature has determined that the project has a legitimate public purpose, the legislature has the ability to choose the means with which to accomplish the project.[63] Judicial restraint requires the Courts to be deferential to the legislatures in determining governmental function.[64] While the scope of judicial scrutiny is narrow, "there is, of course, a role for the courts to play in reviewing a legislature's judgment of what constitutes a public use."[65] No judicial deference is required, for instance, where the ostensible public use is demonstrably pretextual.[66]

In M*idkiff*, the Court held that the use

53. Midkiff, 467 U.S. at 243.

54. I*d*. at 244, n. 7.

55. I*d*. at 239.

56. I*d*. at 236-37.

57. In fact, no oligopoly existed. The condemned land was part of a moral trust formed by the last Hawaiian royalty. Income from the trust supported Kamahamaha schools. The long-term leaseholds were functioning for the public good. Politician John Connor pushed the Act through the Hawaiian legislature for his own benefit. The results were devastating to the lessees. When the land became freehold, Japanese businessmen, who do not tend to deal with leaseholds, bought all the houses, reducing the already limited supply. The Kahala refugees entered a seller's market that was marked by inflated prices. Although the Court held that there was adequate police power to support a public use, the reality is that the public was heavily burdened by the ruling.

58. Midkiff, 467 U.S. at 234.

59. I*d*. at 239.

60. This determination is problematic because the police power usually divides non-compensable regulation and a compensable taking of property. S*ee* Jones *supra* note 8 at 296.

61. Midkiff, 467 U.S. at 240.

62. I*d*. at 240 (citing Old Dominion, 269 U.S.at 66).

63. I*d*.

64. Berman, 348 U.S. at 36; *see also* TVA *v.* Welch, 327, U.S. 546, 552 (1946); *see also* Gettysburg Electric, 160 U.S. at 680.

65. Midkiff, 467 U.S. at 240.

66. S*ee* Armendariz, 75 F.3d at 1321 (holding that a forced sale of private property for purpose of allowing private developer to acquire it at a reduced price would not be for "public use").

of eminent domain is rationally related[67] to the public purpose of reducing the land oligopoly that inhibits the economic market for land.[68] Because regulating oligopolies is a comprehensive and rational approach to maintaining general welfare, the Court held that the legislature could have rationally believed that the Act promoted its objectives.[69] Whether the Act was successful in achieving these goals is irrelevant, the legislature merely had to rationally believe the Act will meet these goals.[70]

The purpose of the taking, not the process, must meet the requirements of the Public Use provision.[71] The Court held that the purpose of the Act, eliminating oligopolies, was a legitimate public purpose, fell within the legislature's police power, and benefited the general welfare.[72] Only a "purely private" taking would not satisfy the requirements of the Fifth and Fourteenth Amendments.[73]

C. "Purely Private" and Removing Blight, the Two Tests of the Public Use Provision

Today, the Takings Clause is still interpreted broadly. To meet the Public Use provision, a legislature need only show that the purpose behind the project falls under its legitimate police power.[74] A connection to public health, safety, morals, or welfare allows a legislature to condemn private property in order to carry out a plan.[75] The most liberal test is the "not purely private" justification of *Midkiff*.[76] Any rational suggestion of general welfare will do.[77]

Most redevelopment programs rely on blight to establish the public welfare, public use requirement. By citing blight, redevelopers lock in on the local government's unquestioned authority to safeguard "health and safety."[78] In California, redevelopers rely on this rationale. The goal of California Community Redevelopment Law is to give a redevelopment agency the power to remove existing blight."[79] Avoiding "future blight" is speculative and, therefore, the courts have held that it is not a means to satisfy the "Public Use" provision.[80] Because a legislature or redevelopment agency must determine existing blight, an area's existing use, not a potential one, is the basis for public use."[81]

However, this extreme reliance on existing blight is not reflected in the

67. Berman, 348 U.S. at 32; *see also* Rindge Co. v. Los Angeles, 262 U.S. 700 (1923).

68. Regulating an oligopoly and the evils associated with it is a classic example of a State's police powers. I*d*. at 242 (citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978)).

69. Midkiff, 467 U.S. at 242 (quotingWestern & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-72 (1981)).

70. I*d*. at 242.

71. I*d*. at 240.

72. I*d*. at 245.

73. I*d*.

74. I*d*. at 240.

75. Berman, 348 U.S. at 28.

76. Midkiff, 467 U.S. at 245.

77. I*d*. at 242.

78. George Lefcoe, F*inding the* B*light* T*hat's* R*ight for California* R*edevelopment* L*aw*, 52 HASTINGS L.J. 991, 992 (2001).

79. Beach-Courchesne v. City of Diamond Bar, 95 Cal Rptr. 2d 265, 279 (Cal. Ct. App., 2000); *see also* Friends of Mammoth v. Town of Mammoth Lakes Redev. Agency, 98 Cal. Rptr. 2d 334, 362 (Cal. Ct. App., 2000).

80. I*d*.

81. Mammoth, 98 Cal. Rptr. 2d at 362.

United States Supreme Court precedent.[82] In *Berman*, the Court upheld a redevelopment plan that invoked eminent domain power for the "prevention, reduction, or elimination of blighting factors or causes of blight."[83] While the District Court narrowly construed the meaning of "slum" within the Act as "existence of conditions 'injurious to the public health, safety, morals, and welfare,'"[84] the Supreme Court allowed a broader reading of the Act. The Supreme Court extended the Redevelopment Agency's authority to include "the blighted areas that tend to produce slums."[85] Prevention of "future blight" seems to fall within the Supreme Court's definition of the Agency's power of eminent domain.

Still, in California, the legislature has narrowed the extent that economic revitalization can be considered a public use and requires that blight be explicitly linked to economic dislocation.[86] The California Supreme Court had already set this high standard in 1976 when it held that only proof of no economically viable use could support a finding of economic dislocation.[87] The city could not treat the site as a liability because of its unrealized potential.[88] In California, "future blight" is not a justified means of satisfying the "Public Use" provision.

D. 99 Cents Only: A Judicial Check on the Redevelopment's Power of Eminent Domain

On this legal background, the District Court of the Central District Court of California approached the public use question in *99 Cents Only Store v. Lancaster Redevelopment Agency*.[89] The district court found that the city and the Redevelopment Agency had violated the "public use" provision of the takings clause, when the Agency initiated condemnation proceedings against 99 Cents with the intent to transfer the property directly to Costco.[90] The court granted 99 Cents' motion for summary judgment and issued an injunction.[91] In 2003, the appellate court reviewed the mootness issue and determined that there was a live controversy at the time the district court granted this injunction.[92]

1. Factual Background

In 1983, the city of Lancaster began a revitalization plan of the area now in question. Under California's Community Redevelopment Law, the city had to establish the parameters of the redevelopment area and a redevelopment plan. The city established the Amargosa Redevelopment Project Area[93] and adopted the Amargosa Plan, which contained

82. Berman, 348 U.S. at 29.

83. *Id.*

84. 117 F. Supp. 705, 724-25 (D.C. D.C. 1953).

85. Berman, 348 U.S. at 35.

86. Findings of blight are to be supported by at least one physical as well as one economic blighting condition listed in the statute. Cal. Health & Safety Code § 33031(a)(1963)(amended 1993).

87. Sweetwater Valley Civic Assn v. City of National City, 555 P.2d 1099, 1104 (Cal. 1976). The court ruled against a redevelopment project that would have replaced a golf course that was susceptible to flooding with a high revenue-producing shopping mall. Although the golf course was marginally profitable, the site would have been more profitable with an intense commercial use.

88. *Id.* at 1103-04.

89. 237 F. Supp.2d 1123 (C.D. Cal. 2001).

90. *Id.* at 1130.

91. *Id.*

92. 2003 WL 932421 *1.

93. The Amargosa Area consists of approximately 4,600 acres.

findings that the Amargosa Area was blighted.[94] The city's specific findings listed "inadequate public improvement and facilities, faulty subdivision planning, and flood hazards" as the blight that plagued the Amargosa Area.[95] To redevelop this area, the Plan gave the city the power of eminent domain for twelve years, until 1995, in order to condemn blighted property. As part of the revitalization process, Lancaster started a regional shopping center development, called the Valley Center shopping center. The plan was to have businesses in the "Power Center" anchor the development. In 1988, Costco Wholesale Corporation agreed to be one such "anchor" business and participated in the development of the shopping center until its completion in 1991 and the completion of infrastructure in 1993.

To fund other planning projects, in 1994, the Agency amended the Plan to allow it to continue using property tax increment funds.[96] At that time, the Agency did not extend its eminent domain powers, and these powers expired in 1995, under the original Plan. A second amendment to the Plan in March of 1997 re-granted the power of eminent domain to the Agency. This revised Plan[97] cited no new findings of blight and instead relied upon the 1983 findings.

In 1998, 99 Cents Only Store, "99 Cents," moved into the Power Center in a vacancy next to Costco. At the time, 99 Cents signed a five-year lease with an option to extend the lease for another fifteen years. 99 Cents was a successful addition to the shopping center, which had become quite prestigious. Soon after 99 Cents opened in Lancaster, Costco felt a need to expand, specifically onto the site occupied by 99 Cents. The property owner, Burnham Pacific, explained that "the most efficient use of [Costco's] property would be an expansion to the south of their existing facility behind the 99 Cents Only Store."[98] Although this solution seemed like an adequate compromise, the city and the Agency considered Costco's demands because they feared Costco would leave and the city would lose the tax revenue.[99] Through negotiations, the Agency, Costco and Burnham Pacific drafted a Disposition and Development Agreement through which

94. The Plan which was adopted by ordinance contained findings that:

"(i) inclusion within the Project Area of any lands, buildings or improvements which are not detrimental to the public health, safety or welfare is necessary for the effective redevelopment of the area of which they are a part; any such area included is necessary for effective redevelopment of the Project Area and is not included for the purpose of obtaining the allocation of tax increment revenues from such area pursuant to Section 3367- of the Community Redevelopment Law without substantial justification for its inclusion."

"(j) the elimination of blight and redevelopment of the Project Area cannot reasonably expected to be accomplished by private enterprise acting alone and without the aid and assistance of the agency."

95. S*ee* 99 Cents Only, 237 F. Supp.2d at 1123.

96. The Plan was amended to comply with AB 1290.

97. The amendments did not add new area to the Plan.

98. S*ee* 99 Cents Only, 237 F. Supp.2d at 1124..

99. The fear of Costco's departure was very real. In the mid-1980's, the cities of Lancaster and Palmdale, the only incorporated cities in the Antelope Valley, competed for many stores and shopping center developments. A number of major tenants have moved from Lancaster to Palmdale, leaving behind large vacant buildings and suffering shopping centers. In 1990, both Sears and J.C. Penney moved to Palmdale with Palmdale's assistance. In 1998, Mervyns relocated to Palmdale. (The empty story was offered to 99 Cents as an option for a relocation site.) Between 1986 and 1994, four major car dealerships relocated to Palmdale from Lancaster. They city was very concerned that Costco might also relocated to Palmdale and leave behind a huge vacant building and the Power Center on the road to deterioration.

the Agency would purchase the property and have 99 Cents re-locate. This decision, made without 99 Cents' input, ended with an agreement that the Agency would acquire the property through eminent domain for $3.8 million and then sell the property to Costco for one dollar ($1).[100]

2. Procedural History

In May 2000, the Agency commenced the condemnation process of Burnham Pacific's property and offered to buy out 99 Cents' leasehold interest for $130,000 and to pay relocation costs pursuant to the terms of the Development Agreement, which required the Agency to use its best efforts to acquire the property. 99 Cents rejected this offer. The city held a public hearing at which the Agency proposed certain Resolutions (21-00 and 22-00) that allowed the Agency to acquire the property through eminent domain. In these Resolutions, the Agency made no findings of blight concerning the Power Center and 99 Cents.[101] The Resolutions were passed June 27, 2000, and 99 Cents commenced this lawsuit.

The Agency rescinded these Resolutions six months later and terminated the Development Agreement.[102] The Agency argued to the district court that these rescissions rendered 99 Cents' complaint moot. However, the Agency would not agree to avoid using its eminent domain power to acquire 99 Cents' property interest if the Court were to dismiss the lawsuit. 99 Cents believes the Agency may later use its power unless the court rules. Prior to the hearing, in March 2001, the Agency had found another site not in the Power Center, which it was in the process of transferring to Costco.

3. Analysis of the District Court's Decision

The district court found that the Agency's attempt to use eminent domain power to obtain 99 Cents' property for Costco violated the public use provision of the Constitution.[103] The Agency's actions failed both the test of blight removal from B*erman* and M*idkiff's* "purely private use" test.[104]

In applying the M*idkiff* standard that only the purpose of the taking must satisfy the "Public Use" provision,[105] the court found that the only reason the Agency "took" the property was "to satisfy the private expansion demands of Costco."[106] Such a purely private taking cannot "withstand the scrutiny of the public use requirement" and does not serve a legitimate governmental purpose.[107] For a taking to meet this Public Use provision, it need only be "rationally related to a conceivable public purpose."[108] This standard is extremely low because the court applies merely the rational basis test to

100. 99 Cents Only, 237 F. Supp.2d at 1124.

101. I*d*.

102. After adoption of the Resolutions, the Agency learned that Home Base would not consent to construction of a Costco gas station in Costco's existing parking lot. The Agency was required to rescind the DDA because the DDA specifically required its termination, if the property could not be acquired for any reason.

103. 99 Cents Only, 237 F. Supp.2d at 1130.

104. The court also made decisions based upon mootness and timeliness. The city and Redevelopment Agency also argue that this case should be heard in state court. This paper does not discuss any of these issues.

105. Midkiff, 467 U.S. at 242.

106. 99 Cents Only, 237 F. Supp.2d at 1128.

107. Midkiff, 467 U.S. at 245.

108. I*d*. at 241.

the proffered public use, which needs not to be proven, only be conceivable. However, even under this deferential standard, mere existence of legislative action does not establish public use as a matter of law.[109] Courts do play a role in reviewing a legislature's determination of the public use.[110] If the public use is demonstrably pretextual, there is no requirement for judicial deference.[111]

Here, the Agency's use of eminent domain was an attempt to transfer private property from one private entity to another. The court held that appeasement of Costco was not sufficiently related to a public purpose to satisfy the Public Use provision.[112] Ironically, appeasement of Costco seems to have been successfully achieved without condemnation of 99 Cents' property because Costco has remained in Lancaster.[113]

Still, the Agency argued that satisfying Costco fulfilled the Public Use provision under B*erman's* blight test. As an "anchor" business, Costco was necessary to keep the Power Center from returning to blight. Under this future blight argument, there is no indication that 99 Cents had elements of existing blight or was contributing to the blight of the area. The Agency relied on the evidentiary findings of blight in the original 1983 Amargosa Plan to show that the Power Center would exhibit blighted conditions if Costco left. The court held that failure to show existing blight means that the Agency lacked a valid public use within the meaning of the Takings Clause.[114] Future blight is not designated as a way to meet the Public Use provision of the California Community Redevelopment Law.[115] However, as explained above, a broad reading of Berman may indicate future blight as an appropriate determination of public use.[116] Still, Lancaster did not discuss the possibility of future blight before this litigation. Because a discussion of future blight is not found in the Resolutions or in the Development Agreement with Costco, this public purpose seems pretextual. The district court found that, even if future blight were a means of establishing public use, the record did not reflect the claim of future blight.[117] The court held that the Agency's attempt to wield its eminent domain power to prevent some unidentifiable "future blight" that may never materialize violated the Public Use provision of the Fifth Amendment Takings Clause.[118]

109. 99 Cents Only, 237 F. Supp.2d at 1128.

110. Midkiff, 467 U.S. at 240.

111. Armendariz, 75 F.3d at 1321.

112. I*d*..

113. Unfortunately, the newly proposed site for Costco requires building on approximately 5 acres of Lancaster's City Park and the cutting down of more than 100 trees.

114. 99 Cents Only, 237 F. Supp.2d at 1128, n. 2.

115. Absence of "future blight" as an allowable public use determination in CRL is practical. If redevelopment agencies were allowed to use their eminent domain powers to remove future blight, there would be no check on their indiscriminate power. No redevelopment site would ever truly be free from blight because future would always loom ever-present on the horizon. S*ee* 99 Cents Only, 237 F. Supp.2d at 1129.

116. In B*erman*, the United States Supreme Court upheld as constitutional D.C.'s Redevelopment Act, which granted eminent domain power to acquire real property for the "redevelopment of blighted territory . . . and the prevention, reduction, or elimination of blighting factors or causes of blight." Berman, 348 U.S. at 29.

117. 99 Cents Only, 237 F. Supp.2d at 1129.

118. I*d*. at 1130.

III. The Meaning of the "Public Use" Provision Is the Future of the Takings Clause

In the Takings Clause of the Fifth Amendment, the inherent sovereign power of eminent domain is limited by the requirement of payment of just compensation and public use. The just compensation requirement naturally limits the government's power and protects private property because the government can only afford to pay for a certain amount of property that it acquires through eminent domain. The Public Use provision requires that the legislature make determinative findings as to public use.

Courts review legislative findings with substantial deference.[119] Under the Takings Clause, the court defers to the legislative determination of "public use" unless "it is shown to involve an impossibility."[120] Such judicial restraint allows state and local governments to make broad decisions affecting their jurisdictions without having these decisions second-guessed by a judge who is unaware of the particular issues affecting the specific communities. The legislature has the role of protecting the public good and, thus, should make these decisions.[121] Eminent domain is one of the tools available to the legislature to protect the public good. The court is a buffer, or as James Madison referred to it, a "defensive authority," between the rights of the people and the legislature.[122] The duty of the courts is to hold the legislature within its enumerated authority. Once a legislature has determined that the public good is compromised, the court presumes that the plan, created to restore the public welfare, is rationally related to a public use. If the legislature exceeds its authority and falsely determines public use, no such judicial deference is required.[123]

The purpose of the Fifth Amendment is to protect the property interest of private individuals. The framers of the Constitution believed popular government could pose a threat to property rights, but they also believed that a strong national government could protect property rights. Alexander Hamilton declared: "One great obj[ective] Of Gov[ernment] is personal protection and the security of Property."[124] For many of the framers, property was intrinsically related to liberty: "Property must be secured or liberty cannot exist."[125] While the Constitution does not proclaim the natural right of property ownership, Virginia and North Carolina did request an amendment which declared that acquisition, possession and protection of property to be listed as an inalienable right.[126] James Madison drafted the Fifth Amendment takings clause as an additional safeguard to due process protection of property.[127]

119. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994) (citing Columbia Broad. Sys., Inc. v. Democratic National Committee, 412 U.S. 94, 126 (1973)).

120. Midkiff, 467 U.S. at 240; *see* also Old Dominion, 269 U.S. at 66.

121. I*d* at 239; *see also* Berman, 348 U.S. at 32; *see also* Hirsh, 256 U.S. at 155.

122. THE FEDERALIST NO. 78 (Alexander Hamilton).

123. Armendariz, 75 F.3d at 1321.

124. *The Records of the Federal Convention of* 1782, vol.1, 302 (Max Farrand, ed.)(Yale Univ. Press rev. ed. 1937).

125. "D*iscourse on Davila*," THE WORKS OF JOHN ADAMS, (1851) at vol. 6, 280 (Charles Francis Adams, ed.)(Little, Brown, 1851).

126. EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 182-84, 198-200 (Norman ed., Univ. of Okla. Press 1957).

127. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 55 (Oxford Press 1992).

In drafting the Fifth Amendment, Madison relied on language from the Northwest Ordinance and the Massachusetts and Vermont state constitutions to convey the financial burden of public works from the individual to the public.[128] The Northwest Ordinance states that

> No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same.[129]

The Fifth Amendment also transfers the burden of public works from the individual to the public by requiring just compensation.

After the states ratified the Bill of Rights, Madison wrote an essay suggesting a broad interpretation of the Fifth Amendment.[130] He declared that a government "which *indirectly* violates their property, in their actual possessions . . . is not a pattern for the US."[131] It seems Madison sought a generous understanding of the takings clause to include more than just physical takings of property. The Supreme Court followed this interpretation when defining modern property rights, after Justice Holmes held that a regulation that goes too far is a taking.[132]

Takings today represent the balance between government action to protect the public good and the property rights of a private individual. When the government, whether it is federal, state, local or a redevelopment agency, acquires private property through eminent domain, the landowner is fairly compensated. The individual is not forced to bear the burden of the public good, which seems to be the rationale behind Madison's Fifth Amendment Takings Clause. On the other hand, the government is limited in its ability to wield its eminent domain power by the requirement of compensation at fair market value. Therefore, this power is used sparingly. This balance and the limit on the abuse of the power come from the just compensation requirement.

The meaning and purpose of the just compensation requirement is clear, but the importance of the Public Use provision is still questioned. In the Constitution, the words "public use" are not defined and the structure does not imply that a taking must be for a "public use."[133] "The phrase does not read 'shall not be taken except for public use and not without just compensation.'"[134] Court decisions tend to rely on the just compensation requirement as the major limitation to the Takings Clause. Such readings of the Fifth Amendment seem to imply that "there is no per se public use requirement."[135]

128. *Id.*

129. *The Northwest Ordinance, Documents Illustrative of the Formation of the American States*, 69th Cong., 1st Sess. at 47-54, *reprinted in* WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF THE UNITED STATES CONSTITUTION (1982).

130. THE PAPERS OF JAMES MADISON vol. 14., 266-68 (Robert A. Rutlands & Thomas A. Mason eds.)(Univ. Press of Vir. 1983).

131. THE PAPERS OF JAMES MADISON, vol 14, 204-07 (Charles F. Hobson & Robert A. Rutlands, eds.) (Univ. Press of Vir., 1979).

132. Pennsylvania Coal, Co. v. Mahon, 260 U.S. 393, 415 (1922).

133. William Stoebuck, A *General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 591 (1972).

134. *Id.*

135. *See* Comment, *Rolling the Dice: Determining*

A. The Public Use Provision is Necessary to Specify the Extent of the Government's Power of Eminent Domain

Although the "public use" provision has become toothless in the text of the modern doctrine, the language "for public use" has an important place in the text of the Takings Clause. For strict textualists, these three words, located between "taken" and "without just compensation," mean that when the government takes privately owned property it must be put to a public use.[136] This construction of "for public use" no longer duplicates the "legitimate state-interest" test that is required by the Due Process Equal Protection Clauses. If Madison intended the Takings Clause to be an "additional safeguard" on the due process protection of property,[137] then the Public Use provision must be a higher standard than the due process test. The Public Use provision's purpose is to relieve the individual landowner of the cost of projects that condemn property for state use to benefit the public and should therefore be borne by the community as a whole.

Such a strict reading of the Takings Clause would reduce redistribution of property[138] and calls into question redevelopment law. Specifically, reading a heightened standard into the Takings Clause through the Public Use provision would nullify *Midkiff*. If the phrase "for public use" merely reflects the requirement of a rational relationship between the state interest and the taking, then no state use is required and the three words are meaningless. Basic statutory construction emphasizes a literal meaning of the text. Why would Madison have included the public use provision, if the Takings Clause requires only basic due process guarantees?

There are two limitations on the government's sovereign power of eminent domain: just compensation and public use. The government must meet both of these requirements in order to lawfully condemn property. Reading the Takings Clause as to only require payment of fair market value and a rational legitimate governmental interest renders the Public Use provision useless. Without this provision, the possibilities of abuse increase. The lower standard of a legitimate governmental interest currently allows for redevelopment agencies to take property from one private party and give it directly to another private party if the transfer seems to be in the public interest or for the public good.[139]

Meddling in the free market is bound to cause problems and incite corruptive uses of the eminent domain power. Competitive markets promote economic efficiency.[140] However, the continual temptation for governments to intervene upsets the balance, efficiency, and success of these markets.[141] One example of a government regulation which seems to benefit the public welfare, but, in fact,

Public Use in Order to Effectuate a "Public-Private Taking"- a Proposal to Redefine "Public Use," 2000 L. REV. MICH. U. DET. C.L. 639, 644 (2000).

136. Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1079 (1993).

137. *See* Ely *supra* note 126.

138. Midkiff, 467 U.S. at 245.

139. *See id.* at 235.

140. EDWIN MANSFIELD, MICROECONOMICS: THEORY/ APPLICATION 277 (1997).

141. *Id.*

severely burdens the public, is rent control. Specifically, in New York, a city of renters,[142] the City Rent Guidelines Board sets rates well below the market levels and also sets limits on vacancy allowances.[143] With this system, landlords lose $200 million more than renters gain.[144] This deadweight loss of $200 million per year is a loss in efficiency and negatively affects the public as a whole.

Similarly, when governments use eminent domain to favor one private interest over another, economic efficiency is lost. The Public Use provision guards against governmental encroachment into the private sector. Therefore, the Public Use provision should be treated as a separate and distinct requirement in the Takings Clause. While a certain amount of redevelopment is acceptable, when it goes to far, to the point of the government meddling in the interests of private parties, a taking has occurred. The district court in 99 *Cents Only* was correct in recognizing a condemnation that lacked the requisite findings under the Public Use provision.[145] Although the Supreme Court has held that removal of blight sufficiently fulfills the Public Use provision, "future blight" is not equivalent to public use. When the government hypothesizes about the impact one existing private entity may have on a community, the use of eminent domain to insure the private entity's success goes too far and is an unconstitutional taking.

However, Madison did intend a broad reading of the "public interest" provision of the Takings Clause.[146] In fact, the B*erman* Court states that eminent domain can be granted to redevelopment agencies to eliminate or *prevent* blighting factors or causes of blight.[147] Perhaps a broader, non-literal interpretation of the "public use" provision is correct.

B. Judicial Restraint Bars Courts from Involving Themselves in the Politics of Takings

Courts are directed to defer to the legislative judgment because the legislature is the body of government charged with protecting the public welfare.[148] The legislature has the resources to make evidentiary findings and to pass laws with the goal of providing for the people. A court that is removed from the public arena may not be aware of the needs of a specified community. In the past, when a judicially active Court involved itself in social controversy, the Court opened the door to years of criticism and non-sensical decisions.[149] In L*ochner v. New York*, the United States Supreme Court overturned a New York law that limited the hours of labor for bakery workers because the majority felt that the

142. Whereas 60 percent of American families own their own homes, only 30 percent of New Yorkers are owners. I*d*. at 283.

143. I*d*.

144. There are about 1.8 million apartments in New York. The average rent in $7,000 per year, whereas the equilibrium rent would be about $8,000. Landlord loss is $1.8 million * ($8,000 - $7,000) = $1,800 million. Gain in consumer surplus is $1,800 million – (1/2 * (2.0 million – 1.8 million) * ($9,000-$8,000)) = $1,700 million. Loss in producer surplus is $1,800 million + (1/2 * (2.0 million –1.8 million) * ($8,000 - $7,000) = $1,900 million. Loss in produce surplus ($1,900 million) – gain in consumer surplus ($1,700) = $200 million. S*ee id*.

145. 99 Cents Only, 237 F. Supp.2d at 1130.

146. I*d*. at 1129.

147. S*ee* Berman, 348 U.S. at 29.

148. Midkiff, 467 U.S. at 239.

149. Lochner v. New York, 198 U.S. 45 (1905).

law did not serve an adequate purpose.[150] For three decades, the Court maintained its role of actively determining the limit of the state's police power.[151] By the mid-1930's, legal realists recognized the *Lochner* opinion as a decision, which merely overturned the political process. There is no reason for the Court to participate in political choices.[152]

Therefore, the court should leave the issues of development to the politics of the legislature. The legislators, elected individuals, are publicly accountable to their constituents. The lobbying and public hearings are designed to provide the lawmakers with information about the needs and desires of the public. The court lacks this information. When the Redevelopment Agency of Lancaster agreed to condemn the property where 99 Cents was located, and pay their relocation costs, this decision reflected what the city council and the Redevelopment Agency thought was best for the public good. It is also evident that 99 Cents did not sufficiently persuade the local government of the benefit it could provide the city. And the public had an opportunity to voice their worries at the public hearings. Judicial restraint reasons that because the court was not present at these hearings it should stay away from this level of local politics.

1. Court Supports Dairy Industry Over Oleo-Margarine Producers

The courts have previously refused to get involved when the legislature has passed laws, which would benefit one private entity over another. In the early 1870's, the dairy industry began lobbying state legislatures for protection through anti-margarine laws. The first result was state labeling statutes in 1877.[153] Because these statutes were not 100-percent effective at protecting the butter industry, the lobbying continued. Relying on weak public interest claims - margarine was alleged to be unhealthy, to cause dyspepsia and a number of other aliments - the dairy industry won over many legislatures. Even a House of Representatives committee, which studied margarine, determined that the imitation product was detrimental to public health.[154] The Supreme Court upheld anti-margarine statutes, which regulated or prohibited the sale or use of margarine, because the state had the power to protect public health.[155] Essentially, the government was legally boosting the dairy industry by regulating margarine production. In 1886, to increase Congressional support, the dairy industry organized a massive letter-writing campaign, which was impressive even by today's standards.[156] Both Houses of Congress passed the federal anti-margarine bill; and under further political pressure, President Cleveland signed the Margarine Tax Act into law.[157] The survival of democracy rests on the fact that people elect legislators to represent their interests. If the courts are continually bypassing the voice of the people, then the result will be a judicial monarchy.

150. *Id*. at 47- 48.

151. S*ee* Coppage v. Kansas, 236 U.S. 1 (1915); *see also* Adkins v. Children's Hospital, 261 U.S. 525 (1923); *see also* Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).

152. S*ee* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); *see also* U.S. v. Carolene Products, 304 U.S. 144 (1938).

153. New York: Act of June 5, 1877, ch. 415, 1877 N.Y. Laws 441; Missouri: Act of April 28, 1877, 1877 Mo. Laws 319.

154. H.R. REP. NO. 2028, at 2 (1886).

155. Powell v. Penn., 127 U.S. 678, 684-86 (1888).

156. Number of petitions from the biggest dairy states: New York (21,923), Pennsylvania (15,487), Iowa (11,601), Ohio (10,081), Minnesota (8,282), Illinois (7,533), and Wisconsin (6,482). 17 CONG. REC. H. 4930 88-89 (1886) (remarks of Rep. Price).

157. H.R. EXEC. DOC. NO.. 396, at 1-2 (1886).

2. Welfare of the Public's Eyes Rests in the Hands of the Legislature

A more recent example of the government successfully defending one private interest over another is *Williamson v. Lee Optical of Oklahoma*. The Oklahoma state law at issue specifically stated that only a licensed optometrist or ophthalmologist or someone with prescriptive authority from an optometrist or ophthalmologist may fit lens to the face or replace the lens.[158] Petitioners claimed the statute was unconstitutional because it violated the Due Process Clause "by arbitrarily interfering with the optician's right to do business."[159] Even though the trial court agreed with the petitioner, the US Supreme Court determined that it was the legislature's role, not that of the courts "to balance the advantages and disadvantages" of the new law.[160] The Court relied upon Judge Waite's wise statement: "For protection against abuses by legislators the people must resort to the polls, not to the courts."[161] As long as the law is "rationally related to the public health and welfare," the legislature may regulate private enterprise.[162] The legislature has an interest in attempting to free eye-professionals "from all taints of commercialism."[163] Even though the legislature chose to only regulate some of the people who work with human eyes, the law proscribing solicitations and advertisements was constitutional because the legislature may choose the evils it can effectively combat.[164]

C. The Impact 99 *Cents Only* Will Have on Takings Law

This case is still in its infancy and, therefore, any forecasts as to the ultimate impact on the Takings Clause and Redevelopment Law are purely speculative. Cities and redevelopment agencies bemoaned the district court's opinion, declaring that the decision will severely hamper the ability of the city's redevelopment agency to undertake future projects.[165] Furthermore, involvement of the courts in municipal decisions undermines the role of the legislative bodies to determine how individual projects are carried out within the bounds of legitimate community redevelopment.[166] Redevelopment agencies are predicting an alarming trend in decisions limiting the government's taking and redevelopment power.[167]

On the other hand, this decision may mark the end of the abuses of redevelopment. Newspapers reporting on this issue stated that property owners can now breathe a collective sigh of relief.[168] This is especially true for a Rancho Mirage

158. 59 Okl. Stat. Ann §§ 941-47 Okl. Laws 1953, c.13, §§ 1-8.

159. Williamson v. Lee Optical of Okla., 348 U.S. 483, 483 (1955)

160. *Id.* at 487

161. Munn v. State of Illinois, 94 U.S. 113, 134 (1876).

162. Lee Optical of Okla., 348 U.S. at 487.

163. Semler v. Or. State Bd. of Dental Exam'rs, 294 U.S. 608, 611 (1935).

164. *Id.* (Reform may take place one step at a time, where the legislature attempts to address the most acute part of the problem)

165. Karen Maeshiro, *99 Cents Ruling Faces City Appeal Redevelopment Hurt, Officials Say*, Los Angeles Daily News, at AV 1 (July 18, 2001).

166. *Id.*

167. Steven Greenhut, Commentary, *An Illegal Taking is Taken Back*, The Orange County Register, (July 8, 2001) *available at* 2001 WL 9677785.

168. *Id.*; *see 99 Cents Only Stores Wins Lawsuit in California Over Property Rights*, The Wall St. J., (July 2, 2001); *see* Martha L. Willman, *The Valley Lancaster's Store Grab Try Illegal Ruling: City erred in plan to take 99 Cents Only property and transfer it to Costco, judge says*, L.A. Times, Valley Edition, (June 30, 2001).

homeowner whose house is being sought by the city's redevelopment agency for a Starbucks coffee shop parking lot.[169] Courts that actively check legislative decisions will reduce corruption and collusion between cities and private entities. By actually enforcing the Public Use provision, courts will no longer rubber stamp whatever redevelopment agencies do.[170] One such court, another United States district court in the Central District of California, relied on the Public Use provision to prevent the transfer of private land for redevelopment purposes.[171] In this case, the city wanted to give the private land of a church to Costco in order to further retail development.[172] The court likened the situation to that in 99 C*ents* O*nly* and described both scenarios as "the naked transfer of property from one private party to another."[173] The similarities between the cases are eerie, but the potential power of the Public Use provision is evident.

Perhaps, the result will be a greater emphasis on property rights, more similar to the intent of Madison and the framers.[174] However, the courts must also recognize the modern complexities of society as important. Madison probably did not envision redevelopment projects and their impact on the modern understanding of the Taking Clause.

Eminent domain should be limited to the creation of either pure public goods or quasi-public goods subject to common carrier provisions.[175] One problem with current analysis of the takings clause and the public use provision is the lack of any factors for the courts to apply to redevelopment situations. One possible approach would be a balancing test where the court would weigh the following factors: "(1) the amount of deference courts are to give to the municipality's proposed legislative action; (2) the economic costs of the takings; (3) the economic benefits of the proposed development; and finally, (4) the private market alternatives that are available to acquire the necessary realty."[176] This test may be effective, but like so many other balancing tests, the lack of a clear test may lead to inconsistent application.

The largest downfall in takings cases is the lack of a clear definition of the public use provision. Under B*erman*, the court must focus on the redevelopment agency's findings of blight.[177] This requirement was relaxed in M*idkiff*, where only purely private takings run awry of the public use provision.[178] In order to reconcile the many federal district and appellate court decisions, the United States Supreme Court needs to develop a comprehensive test to determine what is a public use. Whether this test would hamper redevelopment or protect property owners, it would give guidance to the courts and to the legislative bodies as to what conduct lies within the government's eminent domain power.

169. Maeshiro, *supra* note 165.

170. Greenhut, *supra* note 167.

171. Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

172. I*d*. at 1209.

173. I*d*. at 1229.

174. THE FEDERALIST NO. 78 (Alexander Hamilton); "Property," *supra* note 129.

175. Thomas Merrill, T*he* E*conomics of* P*ublic* U*se*, 72 CORNELL L. REV. 61, 86 (1986).

176. S*ee* Kulick, *supra* note 22 at 679.

177. Berman, 348 U.S.at 35.

178. Midkiff, 467 U.S. at 245.

Takings Resource Guide

1. Timothy Sandefur, A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use," 32 Sw. U. L. Rev. 569, 676 (2003).

   Examines the theoretical history of the state constitution's public use clause and its current vitality as a limitation on the government's power to take property without an owner's consent.

2. David L. Callies, Compulsory Purchase in Hawaii: What's a Public Purpose?, 6-JUN Haw. B.J. 6, 33 (2002).

   States the rule in Hawaii with respect to public purpose is the federal rule: absent an inconceivable public purpose, or one without foundation or impossible, our courts defer to the judgment of the state legislature and the county councils.

3. Robert G. Klein, Twenty First Century Condemnation: Say Aloha to "Public Purpose," 6-JUN Haw. B.J. 7, 36 (2002).

   Argues that at least for the last half century, the ascendant proposition has been that both State legislatures and their county analogues can effectuate takings of private property for purposes co-extensive with their "police powers."

4. Jeffery W. Scott, Public Use and Private Profit: When Should Heightened Scrutiny be Applied to "Public-Private" Takings?, 12-SUM J. Affordable Housing & Community Dev. L. 466 (2003).

   Suggests a means to curb the abuses of public-private takings without destroying their utility for legitimate public projects.

5. Takings and Wetlands
   http://www.epa.gov/owow/wetlands/facts/fact18.html

   The EPA answers the question: When does a government action affecting private property amount to a "taking," and what are the takings implications of wetland regulation?